

ANTIGUA AND BARBUDA

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO ANUHCV2013/0702

BETWEEN: .

KIM DERRICK, acting herein in her capacity as the
Personal Representative of the Estate of Winston Derrick,
deceased, and in her own persona as beneficiary of the Estate of
Winston Derrick, deceased

Claimant

AND

**[1] OBSERVER PUBLICATIONS LIMITED
[2] DOROTHY C. DERRICK**

Defendants

Appearances

Ms. E. Ann Henry, Q.C. with Ms. Latoya Letlow for the Claimant
Mr. Kendrickson Kentish for the Defendants

2015: November 16, December 1; 3
2016: September 22

JUDGMENT

INTRODUCTION AND BRIEF BACKGROUND

[1] **LANNS, J. [AG]:** In this case, the Claimant Kim Derrick seeks the following reliefs:

1. A declaration that Kim Derrick is the beneficial owner of 51 per cent of the shareholding of the First named Defendant, Observer Publications Limited (OPL);
2. An Order directing the Secretary of OPL to concur in the holding of a General Meeting for the purpose of electing a Board of Directors for OPL;
3. An Order directing the Second named Defendant, Dorothy Derrick to concur in the holding of a General Meeting for the purpose of electing a Board of Directors for OPL;

4. Such further and other consequential Orders as to the court may seem fit and just;
5. An Order providing for the costs of this Claim.

- [2] The Claimant, Kim Derrick is represented as the widow and personal representative and beneficiary of the Estate of Winston Derrick deceased. The Second named Defendant Dorothy Derrick is the widow and personal representative of the Estate Samuel A. Derrick, deceased. She is represented in these proceedings by her son Byron Derrick by virtue of a Power of Attorney dated 15th February 2013.
- [3] The first named Defendant, Observer Publications Limited, OPL is a .limited liability company, incorporated in Antigua and Barbuda in 1994 to publish, circulate, and otherwise deal with newspaper or other publications, magazines or periodicals. When OPL was incorporated, Samuel A. Derrick and Winston Derrick were appointed as the only directors, and allotted equal shareholdings. At all material times, until certain events described herein, Samuel and Winston Derrick were the only directors, with equal shareholding, and had equal involvement in the management and operation of the affairs of OPL.
- [4] On the 31st March 2000, Samuel A. Derrick and Winston Derrick executed a written agreement styled "Shareholders Agreement" which incorporated proposals to enable them to "better able to carry out and carry on the existing and future business of OPL and its subsidiaries". A provision in the Agreement stipulated the shareholding of each shareholder during their lives. This was a 50:50 division. However, the Shareholders' Agreement included an agreement for a change in, or re-allotment of shareholdings (from 50:50 to 51:49) in the event one shareholder predeceased the other. Significantly, the Agreement imposed certain obligations on the remaining/surviving shareholder in the event that one shareholder died before the other,¹ to the effect that the surviving shareholder agreed to arrange for the widow of the shareholder who died first, to be paid a monthly sum of money from the operation of OPL.
- [5] Samuel A. Derrick predeceased his brother Winston Derrick in 2003, and thereafter, Winston Derrick ran OPL as majority shareholder without objection from anyone. On the 5th October 2012, Winston Derrick, purportedly, in pursuance of Clause 5 of the Shareholders' Agreement, assigned to himself 51 per cent of the shares in OPL², but no formal transfer was ever effected as contemplated by the Agreement.

¹ These obligations were in relation to benefits to the widow of the shareholder who died first.

² The Annual Returns for the year ending 31st December 2007, registered a shareholding of 51 shares to Winston Derrick and 49 shares to Dorothy Derric .

- [6] Winston Derrick died in .2013. After his death, differences, tensions and disagreements arose between the Claimant and factions within Samuel A. Derrick's immediate family³, as to the Claimant's entitlement to 51 percent of the shareholding and entitlement to assume control of the Board as majority shareholder in OPL. In short, there were differing views, and substantial dispute between the parties in relation to the meaning and effect of Clause 5 of the Shareholders' Agreement.
- [7] This case is therefore centered, and turns on the interpretation of Clause 5 of the Shareholders' Agreement dated the 31st March 2000.
- [8] After considering the pleadings, and the evidence adduced at trial, and for the reasons which follow, I am satisfied that the Claimant is entitled to the reliefs sought for, except that, having not seen Winston Derrick's Will, I am not inclined to the view that the Claimant, in her own persona is the beneficial owner of 51% of the shareholding of OPL. Rather, I am inclined to restrict my declaration to say that the Estate of Winston Derrick, deceased is entitled to be registered as owner of 51% of the shares of OPL. I am also satisfied that even though there has been no formal transfer of the extra share as contemplated by Clause 5 the Shareholders' Agreement, this is not a barrier to the entitlement of the Estate of Winston Derrick, deceased, to have that extra share transferred to the Claimant, as personal representative of the Estate of Winston Derrick; deceased

THE CLAIMANT'S CASE

- [9] The Claimant's pleaded case is that Winston Derrick and Samuel Derrick were the incorporators of OPL. (the incorporators). After incorporation, the incorporators were appointed as Directors of OPL and they were each allotted 1 share in OPL. On the 31st March 2000, the incorporators entered into a Shareholders Agreement. Samuel A. Derrick died on 1st April 2003 and Winston Derrick died on the 2nd February 2013. Dorothy Derrick is the Personal Representative of the Estate of Samuel Derrick, and the beneficiary of the shares held by Samuel A. Derrick in OPL.. At the date of death of Samuel A. Derrick, in accordance with Clause 5 of the Agreement. Winton Derrick became entitled to 51 percent of the shareholding in OPL. By letter dated the 29th July 2013, Kim Derrick, acting in her own persona, requested of the Secretary of OPL, to record the transmission of shares from the Estate of Winston Derrick to her. To date, the Secretary has failed and or refused to comply with the said request. By reason of the failure of the Secretary to comply with the said request, the affairs of OPL are not capable of being properly conducted, in the consequence of which significant prejudice is being done to the Estate of Winston Derrick, as it has no effective involvement in the management and operation of the business of OPL. Wherefore, the Claimant seeks the orders set out at paragraph 1 above.

³ From inspection of agreed documents filed, there are indications that after Winston's death, the Claimant was recorded as a director, had attended meetings of the Board, but her presence at future Board meetings was restricted after the fall out.

THE DEFENDANTS' CASE

[10] The pleaded case of the Defendants consists of admissions and denials. In summary:

- (i) an admission of paragraphs 1 to 5 of the Amended Statement of Claim to the effect that Winston and Samuel Derrick incorporated OPL; that they were indeed appointed Directors and each allotted one share in OPL; that they entered into a Shareholders Agreement; that Samuel A Derrick died on 1st April 2003 and Winston Derrick died on 2nd February 2013.
- (ii) a denial of paragraph 6 of the Amended Statement of Claim; contended that at the time of his death, Winston Derrick only had a 50% shareholding in OPL because, based on Clause 5, Dorothy Derrick (the person entitled to Samuel Derrick's share) would have had to effect the transfer of the extra share, and no such transfer ever occurred.
- (iii) stated that with respect to paragraphs 7 and 8 of the Amended Statement of Claim, the 'Instrument of transfer of Shares under the Will of a deceased Member ...' prepared on behalf of the Claimant, seeks to transfer fifty-one shares in OPL to the Claimant. However, as Winston Derrick did not own fifty-one shares in, or 51% of the shareholding of OPL at the date of his death, he could not pass the same to the Claimant under his Will.
- (iv) stated further that Samuel A. Derrick and Winston Derrick only held one share each in OPL; accordingly, the Claimant is not the beneficial owner of 51 shares or a 51% shareholding in OPL.
- (v) a denial that by reason of the failure of the Secretary to comply with the request of the Claimant, the affairs of OPL are not capable of being properly conducted, in the consequence of which, significant prejudice is being done to the Estate of Winston Derrick, as it has no effective involvement in the management and operation of the business of OPL⁴; puts the Claimant to strict proof thereof.
- (vi) stated that there are no facts pleaded and no particulars given as to why the Claimant seeks an Order of the Court directing Dorothy Derrick to concur in the holding of a General Meeting for the purpose of electing a Board of Directors for OPL;
- (vii) a denial of each and every allegation contained in the amended statement of claim as though the same were set out therein and traversed *seriatim*.

⁴ Paragraph 9 of the Amended Statement of Claim.

EVIDENCE

- [11] The evidence of the Claimant was contained in her witness statement (which she confirmed), and in cross-examination. The evidence of the Defendant was given by Darren Derrick who confirmed the contents of his short witness summary, (which he confirmed as his evidence in chief, and in cross examination⁵. A bundle of agreed documents (including the Shareholders' Agreement and correspondence between counsel representing the Claimant and second named Defendant) were before the court.

THE ISSUES

- [12] Learned counsel for the Claimant, Ms E. Ann Henry Q.C. identified the issues to be:

- a. What is the proper interpretation of Clause 5 of the Shareholders' Agreement.
- b. Whether the Claimant is entitled to 51 % shareholding in OPL. •

On the other hand, learned counsel for the Defendants, Mr Kendrickson Kentish (Mr. Kentish) identified the issues to be:

- a. What is the approach of the court to the interpretation of legal documents?
- b. Is extrinsic evidence, to be considered in the interpretation of the Agreement?
- c. What is the meaning and effect of the agreement? .
- d. What remedies, if any is the Claimant entitled to?

- [13] Ultimately, the principal issue in this matter is whether the Claimant in her own persona, or as representative of the Estate of Winston Derrick deceased, is entitled to 51% shareholding, in OPL, and as a consequence, entitled to control the Board of Directors of OPL, or to be involved in the management and operation of OPL. This issue depends upon the interpretation of the Shareholders' Agreement, particularly Clause 5.

THE SHAREHOLDERS' AGREEMENT: Clauses 1, 5 and 11.

- [14] It is noted that the written submissions of the parties feature three main provisions of the Shareholders' Agreement - Clauses 1, 5 and 11, particularly Clause 5.

⁵ Darren Derrick was asked one question in cross examination.

[15] By Clause 1 of the Agreement, it was agreed that "The Shareholding of the company will remain as follows:

<u>Name</u>	<u>#Shares</u>	<u>% Shareholding</u>
SamuelA Derrick	1	50
Winston Derrick	1	<u>50</u>
	2	100% ⁱⁱ

[16] By Clause 5, it was agreed that "In the event of the death of one shareholder, 1150 of the share of the deceased shareholder shall be transferred at no cost to the remaining shareholder. In consideration of such transfer, the remaining shareholder is obliged to arrange monthly payments to the assigned widow of the deceased shareholder in the amount of EC\$8,000.00 starting no later than three (3) months following the date of the shareholder's death. This monthly amount payable and the recipient, may be altered in writing by mutual agreement of the remaining shareholder and the assigned widow.

As of the date of signing this agreement, the assigned widows are as follows:

- Dorothy Derrick residing at Halcyon Heights, Antigua, wife of Samuel A. Derrick.
- Kim Derrick residing at Hodges Bay, Antigua, wife of Winston A. Derrick."

[17] Clause 11 provided for termination of the Agreement in certain circumstances: "This Agreement shall terminate upon:

- (a) the written agreement of both Shareholders;
- (b) the dissolution or bankruptcy of the Company, or the making by the Company of an assignment of its business due to its bankruptcy, or
- (c) one Shareholder becoming the majority owner of the shares in the Company;
- (d) the simultaneous death of both shareholders."

WHAT IS THE MEANING AND EFFECT OF THE SHAREHOLDERS' AGREEMENT
Submissions of Ms Ann Henry Q.C.

[18] In summary, the position of the Claimant is grounded on the following points:

- (1) In order to reach a determination of the meaning attributable to Clause 5, of the Shareholders Agreement, the Court must give the Clause its ordinary meaning and to read it in the context of the remaining clauses of the contract: **(Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) and others; Alford v West Bromwich Building Society and others; Armitage v West Bromwich Building Society and others⁶; Ocean Conversion BVI Limited v Attorney General ; Attorney General v Ocean Conversion (BVI) Limited⁷relied on)**
- (2) The plain meaning of Clause 5 is that until the death of one of the shareholders, the shares would be held as expressed in Clause 1 and that, in the event of the death of one shareholder, the balance would shift and 1150th of the interest of the decedent would be transferred to the survivor;
- (3) It was in consideration of the transfer of the said interest of the decedent the survivor would arrange monthly payments to the assigned widow of the deceased shareholder;
- (4) The fact that a formal transfer of shares was not effected does not affect the interpretation of Clause 5, nor the entitlement of the Estate of Winston Derrick.
- (5) Clause 11 (c) of the Agreement gives light to Clauses 1 and 5. In simple terms, it was the intention of the two original shareholders that they should remain as equal owners of OPL during both their lifetime. Alternatively, if one were to predecease the other, the surviving shareholder would be entitled to 1150th of the interest of the deceased shareholder. The surviving shareholder would therefore have a majority interest in OPL, that is to say; $50 + 1/50^{\text{th}} \text{ of } 50 = 51$ shareholding.
- (6) This interpretation in no way flouts business common sense and, in fact supports the Claimant's interpretation of Clause 5.
- (7) Given the natural and ordinary meaning of the words used in Clause 5, the only reasonable conclusion should be that the Claimant is entitled to 51% shareholding in OPL; as enjoyed and inherited from her deceased husband, Winston Derrick.

⁶ [1988] 1 All ER 98

⁷ HCVAP 2009/20, per Mitchell J.A.

Submissions of Mr Kentish

[19] The submissions of the Defendants are, in summary, grounded on the following points:

- (1) The court is obligated to construe the Agreement as a whole to ascertain whether the meaning and effect of Clause 5 of the Agreement as advanced by the Claimant would make it inconsistent with the other provisions of the Agreement and/or contrary to sound commercial or common sense;
- (2) While each clause (independently considered) is capable of a reasonably clear interpretation, several of the clauses are in conflict with each other. This makes it difficult to discern the true commercial value of the Agreement. In any event, even on a commercially sensible construction, there are other reasons for the claim to fail.
- (3) When a court is invited to interpret a document, extrinsic evidence is not usually admissible. Where the document is ambiguous, the court may consider certain aspects of the factual matrix. (**Yang Hsueh Chi Serena and others v. Equity Trustee Limited and others**⁸ relied on). In considering the factual matrix, evidence as to the subjective intentions of the parties remains inadmissible
- (3) The witness statements are replete with inadmissible representations of alleged subjective intent of the parties.
- (4) Many of the documents to which the Claimant makes reference, do not form part of the factual matrix. Any material put forward as part of the factual matrix must have (a) existed up to the time when the contract was made; (b) been reasonably available to both parties; and (c) must help the court comprehend how the contract would have been understood by a reasonable person standing in the parties' shoes (**Mannai Ltd v Eagle Star**⁹ relied on). Therefore, the annual returns contained in the Trial Bundle of Agreed Documents filed after the death of Samuel A. Derrick are irrelevant to the court's consideration of the Agreement.
- (5) Clause 5 of the Agreement, on a plain and ordinary construction required 1150 of the shares of a deceased shareholder to be transferred to the surviving shareholder. The stated consideration is the payment of \$8000,000 to the widow of the Claimant.
- (6) The assertion of the Claimant that, based on Clause 5, she is beneficially entitled to 51% of the shares in OPL is in conflict with Clauses 1 and 11 of the Agreement, as these two

⁸ BVIHCMAP2013/0012
⁹ [1997] AC 749

Clauses evince a clear and pellucid intention that Samuel and Winston Derrick (and their estates) should each continue to hold 50% of the shares in OPL.

- (7) Clause 5 was designed to give one brother, upon the death of the other temporary control of OPL, until his death. At that stage, the shareholding would return to a 50/50 division. Clause 5 was clumsily drafted, but the Agreement, read as a whole, evinces a desire to keep the shares equally divided. This view is corroborated by the fact that (a) the language in Clause 5 would allow for a further transfer back to the Estate of Samuel Derrick 1150th of the shares now held by the Estate of Winston Derrick; (b) the Agreement provided for the termination of the Agreement if any shareholder became a majority shareholder. There could be no other purpose for inserting such a clause.
- (8) There has been no transfer of shares from the Estate of Samuel Derrick to Winston Derrick or to his Estate. There has been no claim for specific performance of the Agreement and it is no part of the court's function to repair the Claimant's case.
- (9) The Claimant has no right to claim ownership of 51% of the shares in OPL unless there has been a formal transfer in accordance with the provisions of Section 195 (4) of the Companies Act 1995, to the effect that beneficial ownership passes upon the execution of a share transfer. As 1150th of Samuel Derrick's shares was never transferred to the Claimant, she cannot claim to have more than the original 50% shareholding.
- (10) The Claimant is not entitled to the declaratory and ancillary reliefs sought, as she has provided no evidence capable of supporting her claim that she holds 51% of the shares in OPL. As to the order requesting the second named Defendant to concur in holding a shareholders' meeting, that relief is misconceived; there is an alternative scheme of statutory remedies available to the Claimant (under Sections 131 -132 of the Companies Act 1995) which she has not pursued.
- (11) The Claimant is not entitled to the reliefs sought.

DISCUSSION AND DECISION

- [20] The starting point in this matter is that it is for the court, and not the parties, to decide what is the proper interpretation of the Agreement. The guiding principle which the court applies is that, in interpreting the contract, the court must seek to ascertain and give effect to the intention of the parties. Generally, the intention of the parties must be ascertained from the document in which

the parties have elected to enshrine their agreement. It is only in limited circumstances that the court can go outside the four corners of the document¹⁰

- [21] The Court of Appeal in the cases of **Ocean Conversion BVI Limited v Attorney General**¹¹, **Attorney General v Ocean Conversion (BVI) Limited**¹² reiterated and expanded upon these principles, where Mitchell J.A. stated, in part at paragraph [71]:

"[71] The construction of a contract is a matter for the court and does not depend on the understanding of the parties.... It is for the judge to decide for himself what is the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, and market in which the parties are operating. When one speaks of intention of the parties to the contract, one is speaking objectively; the parties cannot themselves give direct evidence of what their intention was, and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly, when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties. "

- [22] Mitchell, J.A. continued at paragraphs [72] and [73] (which are also instructive):

"[72] [A]s Lord Hoffman said in **Investors Compensation Scheme Ltd. v West Bromwich Society**,

"... the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean...."

"[73] The terms of a contract in the event of a dispute between the parties are to be determined not only by looking for a written contract, but may be deduced from the conduct of the parties, particularly where they have a previous course of dealings with each other based on clear terms, whether written or not, from which may be seen the basis on which they had agreed or must from the viewpoint of the objective onlooker be deemed to have agreed."

- [23] With those principles in mind, I proceed to examine the terms of the Agreement, particularly the wording of Clause 5, to ascertain the intention of the parties to the Shareholders' Agreement.

¹⁰Contract Law, Ewan Mc Kendrick; London: McMillan, 1990; paragraph. 9.6, page.120; Lavelle & Christmas Ltd v Wall (1911) 104 LT 85

¹¹ HCVAP 2009/019 (heard together with HCVA-P2009/020

¹² HCVAP 2009/020, (heard together with HCVAP 2009/019

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- [24] However, I have taken the precaution to read the entire Agreement most carefully, and I am satisfied from an objective standpoint, that when they made the Agreement, the shareholders intended that until the death of one of the shareholders, the shareholding of each shareholder was to be 50/50. However, if one shareholder dies before the other, the surviving shareholder would get an extra share transferred to him so that the shareholding becomes 51/49 in favour of the remaining or surviving shareholder. As consideration for the transfer of the extra share from the decedent's interest, the surviving shareholder agreed to arrange for the monthly payment, out of the operations of OPL of \$8000.00 to the widow of the shareholder who dies first. Once consideration passed from the surviving shareholder, or once the condition precedent has been performed, then appropriate steps were to be taken to have the extra share transferred to Winston Derrick, whereupon he would have become the majority shareholder of OPL. This majority shareholding would have triggered the termination of the Shareholders' Agreement. The words are plain and simple, and I have given them their ordinary grammatical meaning. They are so clear that if an officious bystander had been asked whether that was the common intention of the parties, the answer would have been "of course."
- [25] So where, as in this case, Samuel A. Derrick died first, Winston Derrick became entitled to have transferred to him, or to cause to be transferred to him an extra share in OPL, so that he will then have 51 shares in OPL, as long as he, Winston Derrick discharged his obligation to arrange for the payment of the \$8000,00 to Dorothy Derrick. I am in agreement with learned counsel for the Claimant that Clause 1 and Clause 5 must be read together because these are the Clauses dealing with the shareholdings. In essence, Clause 1 is stating a general position in relation to a specific period. It is saying, in essence that during the lifetime of both shareholders, the shareholding will remain as is - 50:50. However, if one of them should die before the other, then the shareholding will change in favour of the surviving shareholder, but only if the surviving shareholder discharges his obligation in respect of the wife of the decedent shareholder: Once he performs his obligation to completion, once he fulfills the condition precedent, then the surviving shareholder becomes the majority shareholder and Clause 11 (c) stipulating the applicable circumstance for termination of the Agreement, kicks in.
- [26] It follows that I am not in agreement with the submission of counsel for the Defendants that the Agreement did not purport to change the shareholding of OPL, but allowed Winston Derrick some measure of control in the event of death of Samuel Derrick by temporarily assigning to him 1150th of the interest of Samuel Derrick's one share. If this were the understanding, the Agreement would have said so expressly, or explained it. I am not of the view there is anything in the language of Clause 5 of the Agreement which contemplates or admits of the interpretation which counsel for the Defendants has suggested to be put on that Clause, and I decline to write into the clear language of Clauses 1, and 5 and 11 (c) any allowance for a further transfer back to the Estate of Samuel Derrick 1150th of the shares held by the Estate of Winston Derrick. It is trite law that where the meaning of an agreement is clear from its language, a court may not interfere

so as to make it mean what the clear language does not mean.¹³ I am not of the view that Clause 5 in the context of the whole Agreement is ambiguous, or 'clumsily drafted' as counsel for the Defendants have submitted.

- [27] There is material before the court¹⁴ showing that after the death of Samuel A. Derrick, Winston Derrick performed or discharged his obligation under the Agreement, in that Dorothy Derrick, the widow of Samuel A. Derrick has been receiving the monthly benefit (payment of \$8000.00) contemplated/conferred by Clause 5 of the Agreement. What seemed to have remained outstanding was the formal transfer of the 115th share interest of Samuel Derrick's Estate to Winston Derrick the remaining /surviving share holder.

The issue of the non-transfer of the 115th share interest of Samuel A. Derrick

- [28] All parties are agreed that the extra one share was never formally transferred to Winston Derrick. The question then becomes, what is the effect of the failure to effect a formal transfer of the extra share. Does it adversely affect the entitlement of Winston Derrick's Estate to the extra share? If not, is the extra share still transferrable? If so, should it be transferred to the Claimant in her capacity as personal representative of Winston Derrick, or as beneficial owner? How should the transfer be effected and who should effect the transfer. All these questions may conveniently be addressed together.
- [29] As previously stated, Learned Queen's Counsel posits, on behalf of the Claimant, that the fact that there has been no formal transfer of the extra share, does not in any way affect the entitlement of Winston Derrick's Estate. Learned counsel for the Defendants has not offered any direct suggestion on this specific issue. Counsel submitted however, that as Winston Derrick did not own fifty-one shares in, or 51% of the shareholding of OPL at the date of his death, he could not pass the same to the Claimant under his Will.
- [30] I am entirely in agreement with the submission of learned Queen's Council that the fact that there has been no formal transfer of the extra share does not mean that the estate of Winston Derrick is not so entitled. This entitlement was triggered by the receipt by Dorothy Derrick of the monthly payments of \$8000.00. Accordingly, I am of the view that Dorothy Derrick, by her attorney on record (Byron Derrick) is obliged to administer the estate of Samuel A. Derrick, deceased, (or complete the administration of the Estate of Samuel Derrick deceased) to give effect to Clause 5 of the Shareholders' Agreement, consistent with the interpretation of the court.
- [31] The Claimant, in her witness statement described herself as the Personal Representative of the Estate of Winston Derrick, deceased, and she went on to state that a grant of probate appointing

¹³Per Gordon JA. in Stanley Charles and anor v Keith Mitchell et al, Grenada Civil Appeal No 7 of 2004, paragraph [14].

¹⁴See Bundle of Agreed Documents

her in that capacity was issued to her in April 2013. The grant is not before the court, but no issue has been taken by the Defendants on this. In her witness statement, the Claimant made reference to the 'contents of Winston's Will' and ancillary matters as follows:

¹¹ ... Having regard to the contents of Winston's Will, on the 29th July 2013, I caused my Attorney-At-Law to write to request of the Secretary to the First Defendant that she record the transmission of shares in the First Defendant from the Estate of Winston Derrick, deceased, to me.... The Secretary wrote to me in terms which indicated that she was refusing to comply with my request... The second Defendant's Attorney and her Attorney-At-law made it clear to me that there was an issue in relation to the interpretation of the Agreement. ...¹¹

[32] Winston's Will is not before the court. Neither that of Samuel. So the court has no knowledge as to their contents. I hasten to add that no point has been taken on the Will of either decedent, except (as stated before) that the Defendants say that at the date of his death, Winston Derrick did not have 51% shareholding in OPL., and, thus, he could not give away, or pass to the Claimant what he did not have. I make no finding here. But my comment would be if comment were necessary, that that position might be different if there is a residuary clause in Winston's Will, bequeathing Winston's residuary estate, including the shareholding in OPL to the Claimant.

[33] On death, the shares of an individual are transferred by operation of law to his personal representative. The process of transfer is known as transmission, and the transfer provision in the articles addresses the rights of persons entitled to shares by transmission. Such a person is not a shareholder as such until registration.

[34] I take the view that Winston Derrick was entitled by transmission, to 1150 of the shares of Samuel A. Derrick. As legal representative of Winston's Estate, the Claimant is entitled to have those shares transmitted to her and registered in her name, as personal representative of the Estate of Winston Derrick, deceased, and the legal representative of the Estate of Samuel A. Derrick, deceased, ought to take such action as is necessary and proper to ensure and effect the transfer of such extra share

[35] Article 77 of the 'Articles of Association requires OPL to have no less than two directors and no more than five. It is said, and it is not disputed that Winston Derrick, after the death of Samuel A Derrick was the sole director and secretary of OPL. It is not disputed that this was in breach of Article 77, and that the steps Winston Derrick purported to have taken in such capacities (including the purported assignment of 51% shareholding in OPL were inconsistent with the Articles, and as such, liable to be invalidated. That said, it was revealed in examination in chief and in cross-examination that Darren Derrick, the son of Samuel A. Derrick, deceased, has been acting as one of the Directors of OPL. During cross examination, Darren Derrick told the court that he continues to act as Director of OPL.. It means that at some point after the death of Samuel A.

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Derrick and or Winston Derrick, he (Darren Derrick) was appointed as director, and since he continues to act as such, he has an important role to play in ending this feud/impasse.

- [36] Section 195 of the Companies Act sets out the procedure to be followed by persons for the transmission/transfer of shares. Once the process is complete, a share certificate must be issued. It bears repeating that this process has not been properly or formally done, with the result that the legal property in 1150th of the shares of the Estate of Samuel Derrick, deceased remain in the estate of Samuel A. Derrick, deceased (or his personal representative) and Winston A. Derrick, deceased, (or his personal representative) in equal shares, until the extra share is properly and formally transferred and registered in the name of the Claimant in place of Winston Derrick, and the share register rectified.

CONCLUSION

- [37] The court is satisfied that the Claimant, Kim Derrick is entitled to the reliefs sought for, except that, having not seen Winston's Will, I am not inclined to the view that the Claimant, in her own persona is the beneficial owner of 51% of the shareholding of OPL. Rather, I am inclined to restrict my declaration to say that the Estate of Winston Derrick, deceased is entitled to be registered as owner of 51% of the shares of OPL. I am also satisfied that even though there has been no formal transfer of the extra share as contemplated by Clause 5 of the Shareholders' Agreement, this is not a barrier to the entitlement of the Estate of Winston Derrick, deceased, to have that extra share transferred to the Claimant, as personal representative of the Estate of Winston Derrick, deceased. If the Claimant is the beneficiary of shares under the Will of her husband Winston Derrick, then she is also entitled to have 51% of the shares in OPL transferred in her name. I think it is straining the words of Clause 5 of the Agreement to construe them as giving one brother, upon the death of the other, temporary control of OPL, until his death; whereupon, the shareholding would return to a 50/50 division. I do not believe that Clause 5 should be subjected to a strained interpretation in order to reduce or restrict the ambit of its operation. As to the termination Clause, it is evident to me that once Winston's Estate, or his legal representative has been registered as a majority shareholder of 51 shares, and the register rectified to reflect such shareholding, these occurrences will trigger the termination of the Shareholders' Agreement. This, to my mind, makes business sense.

- [38] For all the reasons stated above, I grant the following reliefs:

1. A Declaration that the Estate of Winston Derrick, deceased, is the beneficial owner of 51% of the shareholding of OPL, and that the Claimant, as representative of the Estate of Winston Derrick, deceased, is entitled to be entered in the share register of OPL as owner thereof in place of Winston Derrick, and that the register should be rectified accordingly.

2. An order directing Dorothy Derrick, by her attorney on record (Byron Derrick) do administer the estate of Samuel A. Derrick. deceased, (or complete the administration of the Estate of Samuel Derrick deceased) to give effect to Clause 5 of the Shareholders' Agreement, consistent with the interpretation of the court.
3. An order that Dorothy Derrick the legal representatiy_e of the Estate of Samuel A. Derrick, deceased, whether by herself, her attorney on record, or otherwise, do take such action as is necessary and proper to ensure and effect the transfer of the extra shareholding contemplated by Clause 5.
4. An Order directing that Dorothy Derrick and /or her Attorney Byron Derrick and the Secretary of OPL do concur in the holding of a general meeting for the purpose of electing a Board of Directors for OPL
5. An Order that the costs of these proceedings be awarded to the Claimant Kim Derrick, such costs to be assessed if not agreed. If the parties fail to agree costs, they are to file and exchange schedules of costs and brief written submissions and the basis of assessment of such costs, within 21 days of the date of delivery of a sealed copy of this judgment.

[39] Last, but by no means least, I would urge the parties to put their differences aside and work together towards the common good of OPL. In the case of **Robelto Limited et al v Svoboda Corporation and 18 others**¹⁵. Hariprashad-Charles, J. found it necessary to re-echo and adopt the words of Mr Acuner when he said " The only way forward for us and our Company is for everyone to talk as usiness partners at the appropriate forum which is usually the Board and when appropriate, the General Shareholders' Meeting." I too adopt those words, and commend them to the parties herein and all other persons concerned with, and involved in this matter.

[40] I am grateful to all counsel for their assistance.

High Court Judge [Ag]

¹⁵ BVIHCV2007/0311